damages at $3,000, subject to the opinion of the court on demurrer to evidence." (This, though not the old form of verdict, has of late years become a common one.) As a motion to set aside the verdict must be made before judgment is entered, it must be made here if at all. And yet, no one at this stage knows what the judgment may be. *Non constat* but that it may be for defendant! Let us suppose, however, that a motion is then made and granted. What is the consequence? Instead of a summary disposition of the case, which has heretofore been the object of a demurrer to evidence, the same thing must be gone over at a succeeding term, the same verdict must be found (for a verdict assessing damages is a matter of course), the same motion again made, and so *ad infinitum*.

If that is the law, such a thing as a final judgment in a case tried on demurrer to evidence is a legal impossibility, and yet the procedure has heretofore been taken with that as its main object.

Until the jury has brought in its conditional verdict, there is no trial; for the trial takes place afterwards before the court; and hence this decision practically announces the novel doctrine that there must be a motion for a new trial before there has been any trial!

An examination of the record in the case does not tend to add to the force of the opinion, for it shows that the bill of exceptions was substantially in the form usual in cases of demurrer to evidence.

But, what is more remarkable, an examination of the briefs filed discloses no argument on the point at all. They were devoted to a discussion of the case on the merits, and the only allusion to this question is a citation of the case of *Newberry v. Williams*, in the closing line of appellee's brief, accompanied by no comment.

The decision contravenes the practice of centuries; and, being a mere question of procedure, and not a rule giving rise to vested rights, it may safely be assumed that it will be disregarded by the new court.

Norfolk, Va. ROBT. M. HUGHES.

THE ACTION OF EJECTMENT IN VIRGINIA.

The history of our action of ejectment is one of the most curious in the annals of jurisprudence. It is more than four hundred years old, and during all that period the courts and Parliament of England and the legislatures of our States have been working upon it, seeking to make it more simple and effective. It has been rendered reasonably

such almost everywhere except in Virginia. The revisors of the Code of 1849 made numerous improvements upon the provisions of the former Codes, in which also efforts at reform had greatly simplified the law. And yet the remedy by ejectment is still the most complicated and inefficient to be found in our statute law. This is the case to such a degree that the ordinary practitioner always undertakes such a suit with anxious misgivings as to what may be the result of the clearest and plainest case.

Surely this should not to be so. The wrong to be remedied by ejectment is one of the most grievous which can be inflicted on the citizen. It should therefore be as simple, as prompt and efficient as possible. There is no reason now why it should not be such, whatever reasons to the contrary may have existed in the ages when the feudal system obtained. It should be just as practicable and as easy to recover lands as it is to recover personal property wrongfully held. The Code practice has abolished all distinctions between the two sorts of remedies, and if we are not prepared to go that far, we should be at least ready and glad to remove all needless difficulties.

Yet the action of ejectment has always been unique—one to itself, and so unlike every other that it is full of difficulties if for no other reasons than these:

I. Our statute provides that this action shall be commenced by serving a copy of the declaration on the defendant, with a notice attached that this declaration will be filed on a certain day. There is no reason why it should be thus commenced, or commenced in any way different from that followed in ordinary suits.

II. Section 2726 of the Code prescribes that "the person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising acts of ownership thereon or claiming title thereto or some interest therein at the commencement of the suit."

This provision is the most objectionable of all. The person "actually occupying the premises" may make no claim to and may have no interest in the property. He may therefore be a wholly inconsequential and so neither a necessary nor proper defendant to the suit. The statute is careful to declare in section 2756 that a judgment in such an action "shall be conclusive as to the title or right of possession established in such action, *upon the party against whom it is rendered and against all persons claiming from, through or under such party by title accruing after the commencement of such action.*" And

so, if this "actual occupant" neither has, nor claims title, the judgment against him does not conclude any other who has and makes such title and claim. This "actual occupant" may be a tenant; if so, a judgment against him does not affect his landlord. He may be a squatter; if so, the judgment against him can affect no one.

This "actual occupant" may combine with the adverse claimant and abandon possession before the writ of possession is issued upon the judgment and some other may be put into possession, so that when the officer comes to execute the judgment he finds that Richard Roe is gone, and another, against whom he has no writ, is in full possession and ready to resist the execution of the writ. The owner must then bring his suit against this new "actual occupant," and, when judgment is obtained against him, he may in good time take wing and actual occupant No. 3 may do as his predecessors had done, and so on, *ad infinitum*. Or, on the other hand, this "actual occupant" may combine with the plaintiff and make no defence, just as was always the case with the "casual ejector" in olden times. Mr. Minor, speaking of the action of ejectment as it was practised in those times, characterizes it as "tricky and unjust." And if what I have said of our action of ejectment as it may now be possibly foiled and circumvented be true, is it not liable to a like criticism?

This action is one of tort. Why then may it, not like any other action of tort, embrace all the tort-feasors? Why should the fact that some indifferent, inconsequential person is in possession, hinder or prevent the plaintiff from making all "other persons exercising acts of ownership thereon or claiming title thereto or some interest therein" co-defendants so that they, too, shall be concluded by the judgment or, if the judgment be for the defendants, so that this plaintiff shall also be concluded against the parties whom he has sued?

Some one may say that I have quoted only a part of section 2726, and that my criticism is met by the concluding provisions of that section. I think not. This provision declares that "if a *lessee* be made defendant, at the suit of a party claiming *against the title of his landlord, such landlord may appear* and be made defendant with or in the place of his lessee."

1. My first criticism of this provision is that this privilege of *voluntary* appearance is given only to landlords. If the relation of the "actual occupant" and sole defendant to the action to the adverse claimant of title be any other than that of "landlord and tenant"—if the former is a mere squatter or holding adversely to the latter—then

the adverse claimant, it would seem, cannot voluntarily appear and defend his rights. He must stand by and see his property taken by another without the right to say "nay," or make any movement, no matter how proper and necessary.

2. My next criticism is that this landlord can become a party only by his own act. If his interests may be better protected by his standing aloof, he may use the "actual occupant" as his "cats-paw" and, as I have pointed out above, may contrive to delay and defeat the real owner in his just efforts to recover his own. If he "*may appear* and *be made defendant*," why should not the plaintiff have his right to compel him to appear?

3. My next criticism is that the act does not even require the tenant or lessee to give his landlord notice of the institution of the suit. In England, as far back as in the time of George II., a provision was engrafted upon the law requiring the tenant to give such notice under severe penalties, and, in case he failed to give it, protecting the landlord against the wrong of a judgment without notice. Many of our States, where at one time the law was like ours, made a similar provision. In Virginia no provision has ever been made of any sort by which any notice is required to be given to the landlord by anybody. This omission is most unjust and inexcusable. It may work great injury. The negligent or hostile tenant may let judgment go by default while the landlord is wholly ignorant of the proceeding against his property, and so his possession may be taken from him and he put to his action of ejectment, when he was clearly entitled to all the benefits and protection incident to the position of defendant in an action where, as is so often said, more than in any other, the maxim prevails:

"Melior est conditio defendentis."

See the very suggestive case of *Hanks v. Price*, 32 Gratt. 107.

In conclusion, I recommend that all interested in the noble work of law-reform give some attention to this, the most important action known to our law, and seek to have it made more prompt, more simple, more direct and efficient:

1st. By placing it, as far as practicable, on the same footing with other civil actions, and

2d. That section 2726 be so amended as to allow the plaintiff in ejectment to make defendants of landlords, tenants, lessees, actual occupants AND any "other person who exercises acts of ownership thereon or claims title thereto or some interest therein at the commencement of the suit.

THOMAS J. KIRKPATRICK.